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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 104

UNITED STATES OF AMERICA,
Petitioner,
vs.
ESTATE OF THOMAS S. DONNELLY, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

I.

Whether respondents Carlson, as bona fide purchasers in August 1960 of land in Livingston County, Michigan, were protected by the tax lien filing requirements of the Internal Revenue Code when notices of the tax liens against Donnelly were filed in 1950 only in Wayne County where Donnelly resided and with the Clerk of the local United States District Court, but not with the Livingston County Register of Deeds, when the Michigan Attorney General's Opinion of September 10, 1953 referred to in *United States* v. *Union Central Life Ins. Co.*, 368 U. S. 291 (1961), had not been promulgated and a notice of said tax liens could have been filed in Livingston County in 1950.

Whether Carlson, as bona fide purchasers in August

II.

1960 of land in Livingston County, were protected by the Uniform Federal Tax Lien Registration Act adopted in Michigan in 1956 pursuant to the Internal Revenue Code when Internal Revenue Service neglected until March 1961 to file any notice with the Livingston County Register of Deeds of 1950 tax liens against Donnelly who *acquired* said land when his wife died in May 1960.

STATUTES INVOLVED

In addition to petitioner's statutory citations, Section 6323(a) of the Internal Revenue Code of 1954 is set forth in Appendix A, *infra*, p. 16.

STATEMENT

On December 30, 1966 petitioner filed a Complaint in the District Court to foreclose income tax liens which arose from assessments made in 1950 against Thomas S. Donnelly, Sr. who died in January 1963. Respondents Carlson, who petitioner concedes were bona fide purchasers, acquired certain land in Livingston County, Michigan, from Donnelly in August 1960, sixteen months before the decision in *United States* v. *Union Central Life Ins. Co.*, supra.

At the time the assessments were made against Donnelly, the 1923 Michigan statute providing for local filing of Federal tax lien notices with county registers of deeds had been in force for twenty-seven years. Although the statute required that the notice contain a description of the land against which the lien was claimed, it was not the practice of registers of deeds in Michigan to refuse notices without such a description until 1953 when Michigan Attorney General's Opinion No. 1709 (petitioner's Appendix B, pp. 19-21) was published. Prior to that Opinion, the Internal Revenue Service had been filing locally under the Michigan statute. On November 28, 1950 (the day before the notice was filed in the District Court) the Register of Deeds of

Wayne County, Michigan, where Donnelly resided, accepted a standard notice of lien. Neither the Complaint (A.5) nor the Opinion of the District Court (A.52) referred to by petitioner in its "Statement" (p. 4) supports petitioner's allegation that said notice was limited to Donnelly's personal property.

Although petitioner claims that the Treasury Department refused to acquiesce in the Michigan requirement that real property be described in its notices, it did in fact acquiesce when it made no attempt to appeal the decision of the United States Court of Appeals for the Sixth Circuit in *Youngblood* v. *United States*, 141 F. 2d 912, which upheld the Michigan filing requirements in 1944—sixteen years before respondents acquired Donnelly's property. The 1950 filing in Wayne County and the 1961 filings in Livingston and Genesee Counties (A. 5) are evidence of its acquiescence.

Petitioner's allegation that Donnelly executed a *second* statutory waiver in April 1961 (eight months after his transaction with respondents) extending the time for collection of his tax liabilities to December 31, 1966 has not been admitted (A. 10). Paragraph 1 of respondents' Affirmative Defense A.—Statute of Limitations (A. 11) contends that the alleged 1961 waiver could not extend the period of enforcement of the lien as against respondents' land, and this issue has not been adjudicated.

ARGUMENT

INTRODUCTION and SUMMARY

The issues in this appeal are twofold. First, is whether the tax lien notice filed in the District Court in 1950 entitles petitioner to priority over a bona fide purchaser who sixteen months before the decision in *United States* v. *Union Central Life Ins. Co., supra*, acquired land in a county where such a notice could have been filed in 1950 (A. 44), or at any

time after April 13, 1956. Involved in this issue is whether this Court intended that significance be given to the statement at 368 U.S. 293:

> "In support of its contention the Government pointed to the fact that in 1953 the Michigan Attorney General ruled that federal tax lien notices not containing such a description are not entitled to recordation, and it is stipulated that *from the time of that ruling, up to 1956*, 'it was the policy of the office of the Register of Deeds for said County of Oakland not to accept for recording notices of Federal tax liens which did not contain a legal description of any land'."*

The crux of this issue is whether *Union Central* is to be construed as retroactively affecting priorities of title interests which came into being in Michigan during the entire forty-year period between 1923 and 1961 when *Union Central* determined the statute, as interpreted and enforced by local registers of deeds after the 1953 Michigan Attorney General's Opinion, to be invalid as to a tax lien which arose in 1954.

The second issue in this appeal is whether the filing in the District Court in 1950 (irrespective of the determination of the first issue in this appeal) can be considered notice *in perpetuity* affecting the land purchased by respondents from Donnelly in August 1960. The question of law involved is whether respondents as bona fide purchasers were entitled to the protection of the notice filing requirements of the Internal Revenue Code where the land in Livingston County acquired in 1949 by Donnelly and his wife as tenants by the entireties did not belong to Donnelly until his wife

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*The official synopsis of *Union Central* (368 U.S. at 291) states:
"... and it was the *practice* of county officials to refuse to accept for recording notices of Federal tax liens not containing such descriptions ..."

died in May 1960, and where, although in compliance with Section 6323(a) of the Internal Revenue Code of 1954 Michigan had in 1956 adopted the Uniform Federal Tax Lien Registration Act (Act 107, Public Acts of Michigan of 1956; M.S.A. 7.753(1) et seq.), no effort was made by petitioner to file a notice which would cover Donnelly's newly-acquired property in Livingston County until March 1961.

WHETHER THE DECISION IN UNITED STATES v. UNION CENTRAL LIFE INS. CO. AFFECTS FEDERAL TAX LIENS WHICH AROSE IN MICHIGAN BETWEEN 1923 AND SEPTEMBER 10, 1963.

Union Central involved a tax lien notice filed in the District Court in January 1954 — several months after the Michigan Attorney General's Opinion of September 10, 1953, *supra*. In *Union Central* the Government supported its contention that its filing in the District Court gave it priority over a mortgage subsequently executed and recorded with the Oakland County Register of Deeds by stressing the importance of the 1953 Michigan Attorney General's Opinion and the stipulated policy of the Oakland County Register of Deeds not to accept Federal tax lien notices without a description of land from the time of that ruling, up to 1956 when Act 104, Public Acts of Michigan of 1923 was repealed and replaced by the Uniform Federal Tax Lien Registration Act.

The present case is not identical to *Union Central* since the tax liens arose in 1950—three years before the Michigan Attorney General's Opinion. Although notice of the tax liens against Donnelly was accepted on November 28, 1950 by the Register of Deeds in the County where Donnelly resided, no attempt was made to file a similar notice in Livingston County where respondents' land is located until March 20, 1961 (A. 5). It was conceded by the Government

that in 1950 the notice could have been filed with the Livingston County Register of Deeds (A. 44)*.

The trial court correctly distinguished this case from *Union Central*. Respondents submit that this Court did not intend that its lengthy reference to the 1953 Michigan Attorney General's Opinion and the subsequent events in Oakland County to be taken as mere *dicta*.

IS UNITED STATES v. UNION CENTRAL LIFE INS. CO. TO ALTER PRIORITIES OF TITLE IN MICHIGAN BETWEEN 1923 AND 1961.

Matters involving title to land and priorities of competing interests in land involve substantial questions of vested rights. In *Union Central* this Court had before it certain events which occurred in Michigan during the period from 1953 through 1956 and in stating:

> "It was therefore error for the Michigan courts to fail to give priority to the Government's lien *here*, notice of which had been filed in the District Court in accordance with Federal law." (368 U.S. at 296).

it confined its opinion to the period of time and the events in issue. The trial court in considering the vested rights of respondents and the relative equities of the parties correctly reasoned that in *Union Central* this Court did not intend to alter property rights which vested during the entire 33 year life-span of the 1923 statute. Accordingly, the trial court did not allow petitioner, more than six years after bona fide purchasers had acquired land, to use a decision announced sixteen months after such purchase to divest

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*Although in 1950 the land did not belong to Donnelly within the meaning of Section 3670 of the Internal Revenue Code of 1939, there were occasions when the Internal Revenue Service filed notices for the tax liability of one of the spouses where only entireties property was involved. (See *Haldeman* v. *U.S.*, E. D. Mich. S.D., 93 F. Supp 889 (1950)). A notice could have been tendered and the Livingston County Register of Deeds would have accepted same without inquiring into whether any property in that County actually belonged to Donnelly at that time

respondents of rights which became vested under events which occurred before 1953 and after 1956.

Petitioner claims that "consistent with its administrative practice" it refused to comply with the Michigan statute and filed its notice of lien in the District Court in 1950. If this is true, then petitioner's administrative practice was contrary to the law as had been interpreted in 1944 by the Court of Appeals in *Youngblood* v. *United States, supra,* and there was no justification for petitioner to refrain from even attempting an appeal of that decision.* Petitioner allowed *Youngblood* to stand for seventeen years as the highest judicial pronouncement of the validity of the 1923 Michigan statute, and petitioner now asks this Court to extend *Union Central* retroactively eleven years to alter vested rights which came into being in the interim. The trial court correctly relied upon the principles enunciated by this Court in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1939) and *NLRB* v. *Rockaway News Supply Co.,* 345 U.S. 71 (1953):

> "The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and corporate, and particular conduct, private and official.
>
> "Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination." (308 U.S. at 374).

Because petitioner claims that it adhered to a position which ultimately was confirmed by this Court, it asks that a penalty be imposed upon respondents and others for rely-

*No petition for certiorari was ever filed.

ing upon the law as known in Michigan for almost forty years. Whereas, on hindsight, the author of the law review article cited by petitioner may have correctly predicted a development ten years in the future, hundreds of Michigan lawyers and title examiners who reviewed and passed upon thousands of real estate transactions which occurred between *Youngblood* (1944) and *Union Central* (1961) had to follow the law as it was known to them. *Youngblood* was the only precedent available to them and thousands of transactions were made in reliance upon *Youngblood*. Petitioner had ample opportunity to bring about a change in that precedent, but until *Union Central* came before this Court in 1961 petitioner did nothing to clarify the law. Under the circumstances, a broad, retroactive construction of *Union Central* would be contrary to equity and good conscience.

Petitioner asserts that because it made administrative decisions in recent years to disregard the clear intent of Section 6323(a) of the 1954 Code (i.e., protection of innocent mortgagees, purchasers, etc.) by federally filing notices in several States which designated local offices for the such notices, *post-Union Central* filings in five States have been "clouded" by the decision of the trial court. At the same time, and with the fence-straddling reminiscent of the dual filing against Donnelly (and presumably others in Michigan) in 1950, petitioner has instructed its agents to make local filings in those States "for the convenience of persons who have occasion to search for such notices". (See Rev. Rul. 64-252, 1964-2 Cum. Bull. 497; also see Rev. Proc. 67-15, 1967-1 Cum. Bull. 592). *Query:* Which side of the "fence" will petitioner take when the inevitable occurs and one of its agents neglects to federally file one of the notices it has been locally filing for "convenience"?

Although respondents have examined the statutes in ques-

tion and believe that petitioner's objections are without merit, the validity of notices filed under those statutes and petitioner's administrative procedures with respect to same would best be left to direct litigation.

WAS INTERNAL REVENUE SERVICE REQUIRED TO FILE A TAX LIEN NOTICE IN LIVINGSTON COUNTY IN MAY 1960.

Petitioner has consigned to a mere footnote an issue of law raised by respondents and thoroughly briefed by both parties in the trial court and before the Court of Appeals. In August 1956 the Uniform Federal Tax Lien Registration Act, *supra,* became effective in Michigan. The validity of that Act has never been questioned by petitioner. As respondents have argued in this Brief, and as was determined by the trial court and the Court of Appeals, the federal filing in 1950 did not constitute *notice* to respondents when they as bona fide purchasers in 1960 acquired Donnelly's Livingston County property. Respondents' contention that petitioner was obligated to file a notice in Livingston County after Mrs. Donnelly's death in 1960 is in no way intended by them to be an admission of the validity of the federal filing.

Respondents assume and contend that the Government did, in fact, have a continuing duty to respond to changes in State law by filing notices affecting *after-acquired* property in the appropriate State office "authorized" (as used in §3672 of the Internal Revenue Code of 1939) or "designated" (as used in §6323(a) of the 1954 Code)* *whenever* the State by law "authorized" such filing or "designated"

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*Although the trial court referred in its opinion to § 3672 of the 1939 Code, the Complaint (A.6) alleges that Donnelly signed a statutory waiver in 1956. Assuming that this is true, then the lien would have been extended under the 1954 Code and the wording of § 6323(a) may be applicable.

such office. That there is such a duty is clearly stated in *Union Central* (368 U.S. at 294):

> " . . . §3672(a)(1) unquestionably requires notice of a federal lien to be filed in a state office when the State authoritatively designates an office for that purpose, . . . ".

Petitioner confuses the tax lien which was created in 1950 in favor of the United States upon property belonging to Donnelly pursuant to Section 3670 of the 1939 Code with the government's statutory obligation to *perfect* such lien as against mortgagees, pledgees, purchasers or judgment creditors of such property, or of Donnelly's after-acquired property *(Glass City Bank* v. *United States,* 326 U.S. 265 (1945)*)* by filing a notice of the lien in the office designated in §3672 of the 1939 Code (or §6323(a) of the 1954 Code). Failure to perfect the lien by filing does not invalidate the lien itself but merely affects the relative priorities of the Government and the protected classes of intervening third-parties, and then only with respect to those properties of the delinquent taxpayer in which such third-parties have obtained an interest. In other words, the 1950 liens against Donnelly, if properly extended by the statutory waivers purportedly signed on February 14, 1956 and April 17, 1961, were not themselves voided by petitioner's failure to file notice in Livingston County prior to Donnelly's sale to respondents. The liens merely became subordinate to the title interest which respondents acquired in said land as bona fide purchasers without knowledge of said liens.

Petitioner's apparent argument that from 1950 on it had a lien on the land which Donnelly sold to respondents but that it merely could not "foreclose on the lien" until Donnelly became the sole owner of the property at his wife's death in 1960 is contrary to the authorities extensively

briefed by respondents in the trial court and before the Court of Appeals. In argument before the Court of Appeals petitioner conceded that under Michigan law it had no lien against respondents' property until Mrs. Donnelly died.

Michigan adheres to the common-law doctrine that in an estate by the entireties neither the husband nor the wife alone have an interest capable of being sold, mortgaged, executed upon, taken by a trustee in bankruptcy, or levied upon for the tax liability of one of the spouses. See *United States* v. *Nathanson,* D.C., E.D., Mich., S.D., 60 F. Supp. 193 (1945) and the cases cited therein.

The Court of Appeals for the Eighth Circuit in the case of *United States* v. *Hutcherson,* 188 F. 2d 326 (1951) in affirming a District Court in Missouri where the common-law concept of tenancy by the entireties is identical to that in Michigan said:

> "Under Missouri law the individual interest of the husband or wife in an estate by the entirety is, like the rainbow in the sky or the morning fog rising from the valley, not such an estate as may be subjected to the grasp of an attaching creditor or which will permit the adherence thereto of a tax lien. We are not at liberty to change the nature of either. The definition of the nature of the Missouri estate by the Missouri courts has become the 'inveterate policy' of the state. * * * It is applied by the state courts in determining whether liens arising under state law may attach to the individual interest of either spouse. Uniformly it is held that such liens may not. Not because State or Federal liens are withheld from this particular 'right to property', but because *the interest of one spouse in the estate by the entirety in Missouri is not a right to property or property in any sense.* We may not change the nature of the estate or the interest of one spouse therein for purposes of federal taxation.

> "It is argued that the United States only sought to hold a lien against the husband's possible future interest and that the trial court had no right to defeat that right. *The answer is that the husband had no separate interest to which the lien could attach* * * *". (188 F. 2d at 331).

The Court of Appeals for the Fifth Circuit, reviewing Florida law and citing *Hutcherson* as authority, held in *United States v. American National Bank of Jacksonville*, 255 F. 2d 504 (1958), at 507:

> "The husband * * * did not have an interest in the subject property during his wife's lifetime to which a lien for Federal taxes, owed by him but not by her, could attach. *Upon (the wife's) death the tax lien attached to the property as of the date of her death.*"

From the annotation in 75 A.L.R. 2d 1176 it is apparent that Florida, Missouri and Michigan have uniformly rejected attempts of creditors of one spouse, including the Government, to assert any interest in entireties property.

Respondents have never questioned this Court's decision in *Glass City Bank* v. *United States, supra,* as to the attachment of a federal tax lien to after-acquired property. They concede that the tax liens (but *not the notice* of the liens) *attached* to the Livingston County property *when it was acquired by Donnelly* but it is their contention that the property was not acquired by Donnelly until his wife died in May 1960. The tax liens attached in May 1960, but they were *not perfected* as against mortgagees, purchasers, etc. of Donnelly's Livingston County property under Section 6323(a) of the Internal Revenue Code of 1954, then in force, *until eight months after respondents' purchase.* In March 1961, nine months before *Union Central,* and without any other intervening events requiring such filing, a notice of the lien was first filed with the Livingston County Register of Deeds (A.5). A notice was also filed at that time in Gene-

see County, Michigan (A.5). It is evident that the Government recognized the necessity of complying with the Michigan Uniform Act, but its compliance was too late to give priority to its liens over respondents' intervening title interest.

Both the 1939 and the 1954 Codes* provided for local filing of a tax lien notice " * * * *whenever* the State or Territory has by law authorized (or designated) an office within the State or Territory for the filing of such notice". The word "whenever" is defined in Webster's Third New International Dictionary, 1963, as:

> "at any or all times that"; "in any or every instance in which"; "at whatever time"; "no matter when".

It is entirely consistent with orderly administration of the collection of revenues to require the Internal Revenue Service to *perfect* tax liens against *after-acquired* property by filing in a state or county where a delinquent taxpayer does not reside and at some time subsequent to the filing of a tax lien notice in his "home" state or county he acquires property for the first time.

In *Faulk* v. *United States*, 412 F. 2d 369 (1969) the Court of Appeals for the Sixth Circuit (at 373):

> "Some Government scrutiny of the affairs of delinquent taxpayers sufficient to enable it to know where to properly file notice of lien seems to have been contemplated by this entire statutory scheme. Requiring the Government to investigate the affairs of the delinquent taxpayer to determine to what property the statutory lien attaches and therefore where to properly file the required notice of lien in no way cuts down on the broad scope of the lien".

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*Substantial changes in wording of § 6323 of the 1954 Code were adopted in 1964 after the events involved in this appeal had all transpired.

The requirement that the Government prevent innocent third-parties from being subjected to "secret" Federal tax liens is manifested in the notice filing requirements of the Internal Revenue laws enacted by Congress in ever increasingly protective versions since 1913. Although the 1927 West Virginia legislature may have exceeded the intent of Congress *at that time* by providing for re-filing of *all* existing notices within a four-month period under penalty of declaring same void, *In re Dartmont Coal Co.*, 46 F. 2d 455 (C.A. 4) should not be construed as authority for the Government to avoid its obligation to file locally in a county where the delinquent taxpayer does not reside but at some time subsequent to the creation of the Federal tax lien (and after a state has provided for local filing) he acquires real property. Congressional intent to protect innocent third-parties is further indicated in the 1964 amendments to Section 6323 of the Internal Revenue Code of 1954 which, among other changes, requires the re-filing of notices whenever tax liens are extended beyond their usual six-year limitation period by the execution of statutory waivers.

Respondents Carlson who, as innocent purchasers of real property in reliance upon State law as known for almost 40 years, find their ownership jeopardized by the tax liabilities of a virtual stranger long deceased. The decision of the District Court, and its affirmation by the Court of Appeals, were based upon application of sound legal principles and tempered with proper regard for justice and equity. "Even the most solicitous regard for the protection of Federal revenues does not counsel a policy of tax collection at the expense of non-liable third parties." *U.S.* v. *Lebanon Woolen Mills Corp.*, D.C., N.H., 241 F. Supp. 393 (1964), at 399.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectully submitted,
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Dated: December 1969.

APPENDIX A

Internal Revenue Code of 1954:

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) Invalidity of Lien Without Notice. — Except as otherwise provided in subsections (c) and (d), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate —

(1) Under state or territorial laws. — In the office designated by the law of the State or Territory in which the property subject to liens is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) With the clerk of district court. — In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

* * * * * * * *